

THE CONTENTIOUS ISSUE OF DRUG TESTING IN THE WORKPLACE: THE CASE OF THE SOUTH BLACKWATER MINE

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Abstract

Alcohol and illicit substance abuse in the workplace is increasingly becoming a major human resource and employee relations issue. Whilst more sophisticated measures have been developed to test and monitor drug use in the workplace, and despite tacit union support on the grounds of occupational health and safety (OH&S), the implementation of drug testing procedures remains a contentious issue. This paper firstly examines the arguments for and against drug testing and secondly, examines the issue through the use of a case study analysis. The (mis)handling of the issue at the South Blackwater Mine in Queensland in August of 2000 resulted in a major industrial dispute that affected the lives of hundreds of employees and contractors.

Key Words: Drug Testing, OH&S, Privacy, Productivity, Employee Relations, EAP.

Biography

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The Issue of Substance Abuse at Work

Substance abuse and the potential dangers it poses in the workplace are well documented. Wall (1992) identifies that both illicit substance abuse and “recreational” substance use (i.e. alcohol) impact negatively upon almost all industries in Australia, causing substantial costs in both human and economic terms. Conservatively it has been estimated that substance abuse in Australia:

- imposes direct costs upon industry (predominantly in lost productivity) amounting to some \$3.7 billion annually;
- imposes indirect costs to industry of \$10 billion annually (eg. Employee turnover, poor decision making; employee stress); and
- accounts for 10 per cent of workplace deaths and 25 per cent of workplace accidents (Wilkie, 1998).

Richmond, Heather, Holt and Hu (1992), note that illicit drug use is also responsible for harm

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(stemming from negligence) to other individuals within the workplace. Under OH&S legislation (enacted in each Australian state) there is an obligation upon employers to provide a safe place of work for all employees and visitors to their sites. Employers are subject to strict liability under this law and face significant fines if found to be in breach (Keenoy & Kelly, 1998). Employer liability extends to their employees' actions and/or omissions, regardless of their state of mind. Research from the USA, where drug-testing is common place, indicates that the use of drug-testing programs in both employment and pre-employment testing has been a major factor in the reduction of absenteeism and accidents, and is the most popular method of removing the issue of substance abuse in the workplace (Osterloh & Becker, 1990; Greenberg, 1992; Hartwell et al, 1996; Flynn, 1999). These points provide a compelling case for drugtesting in the workplace to ensure that firstly, the employee is meeting his/her contractual obligations to a satisfactory standard, and secondly, to meet the requirements of duty of care under OH&S legislation (DesJardine & McCall, 1990). Implicit in these points is that employers who do not have drug testing policies and programs are potentially maintaining an unsafe workplace (Redeker & Segal, 1989). However, as Gip (1999) notes, a report by the American Civil Liberties Union (ACLU) questions the cost- effectiveness and overall value of drug-testing:

The ACLU cites analysis by a committee of the National Academy of Sciences (NAS) which found that most workers who use illicit drugs never use them at work, and when they use drugs on their own time, they do so in a way that does not affect work performance (p.16).

The issue of performance is an important concept as DesJardine and McCall (1990:203) point out - To what level of performance are employers entitled? If an employee's productivity is satisfactory he/she is meeting contractual obligations, the knowledge of drug use on the grounds of productivity is not pertinent. Secondly, whilst the issue of duty of care is important, equally not every job has the potential to do harm. DesJardine and McCall (1990) argue:

To say that employers can use drug testing to prevent harm is not to say that every employer has the right to know about the drug use of every employee (p.204).

In this context therefore, less intrusive alternatives such as impairment testing to ensure fitness for work are likely to be more effective and are not likely to raise the concerns of privacy and fairness (Sorohan, 1994; Maltby, 1999). These are important considerations that employees and their representatives (the trade unions) are concerned with when the issue drug-testing in the workplace is raised.

From an employee perspective, the first consideration is the right to privacy. Using Mills' principle of liberty, Bowie and Duska (1990:89) put the argument as follows ".... employees have the right to do whatever they wish as long as it does not harm the employer". In this context, if a person chooses to take illicit drugs outside of work commitments, it is no concern of the employer as long as it does not impinge on work performance (Bowie & Duska, 1990). In addition, as Maltby (1987) suggests, drug testing suffers from accuracy problems. Typically drug-tests cannot determine whether the effects of illicit drugs (which may remain in the system for days and even weeks) will substantially impair or affect performance. Webb and Festa (1994) also note that the link between drug usage and on-the-job injuries is at best tenuous. Drug testing may also uncover other medical conditions which may effect the employment status of workers. As Wasserstrom (1978) argues in this context, employees have a right to 'informational privacy'. This is supported DesJardine and McCall (1990) who state:

.... an employee's right to privacy is violated whenever personal information is requested, collected, or used by an employer in a way or for a purpose that is irrelevant to or in violation of the contractual relationship that exists between employees and employers (p.202).

Thus the argument that the innocent have nothing to fear from drug-testing is erroneous, as it may violate employee rights in a number of ways if testing has the potential to provide the employer with generic medical information which is not relevant to the contractual relationship (Cranford, 2001). In addition mandatory testing may be open to improper or malicious use of procedures to intimidate or

target employees who undertake activities that may be unpopular with management, such as union activism (Webb & Fester, 1994). Therefore, the use of drug-testing within the workplace may create an atmosphere of insecurity, oppression and anxiety in employees and may actually result in lower performance and turnover (Redeker & Segal, 1989). Indeed Bohle and Quinlan (2000) have noted that this has been an important consideration of the Australian management of US-based organizations which have pursued the introduction of these measures. In addition, Bahls (1998:82) notes that the Internet is filled with tips on how illicit drug users can evade drug tests and detection.

From a union perspective, the Australian Council of Trade Unions (ACTU) generally does not support the introduction of any form of biological testing of workers for alcohol or other drugs in the workplace, except in very limited circumstances and subject to joint union and employer agreement (ACTU, 1991). They argue that the introduction of testing cannot be seen as a quick fix solution and is unacceptable and inappropriate in most circumstances. The ACTU does not consider that the introduction of a testing program is an effective strategy for the workplace. Testing for alcohol and other drugs is usually an inappropriate feature of any prevention program for a number of reasons:

- The inaccuracy of test results, both positive and negative;
- Drugs testing measures exposure, not impairment. This is especially the case with drugs other than alcohol;
- The problems and errors with interpretation of test results;
- The impact of prescribed medication and over-the-counter drugs;
- The focus on the individual;
- The infringement of individual rights;
- The problems associated with the right to privacy; and
- The disruption to industrial relations (ACTU, 1991).

The ACTU position is that there must be joint development of any drugs testing policy by unions and employers, particularly where alcohol or other drugs misuse is identified as a workplace issue. Indeed, any policies dealing with workplace hazards and OH&S should be jointly developed and implemented. The ACTU policy framework on the subject focuses on:

- Safety at work specifically;
- Having full participation in and joint control by workers and their representatives;
- Be applicable to both workers and management;
- Address the workplace causes of alcohol or other drug misuse;
- Be consultative, educative and rehabilitative, not punitive; and
- Maintain confidentiality at all levels (ACTU, 1991).

This pluralist stance adopted by the ACTU is based upon the argument that it is only when drugs and alcohol are misused to the extent that the user cannot properly and safely carry out regular duties, a need then arises for control and prevention measures.

In any consideration of the appropriate response in particular workplaces, there must first be involvement of union representatives, and secondly an examination of the broad environmental factors such as those listed above. The ACTU also argues that rehabilitation action should be undertaken during working hours or through schemes that include paid leave. A key issue the ACTU promotes is that the misuse of alcohol and other drugs may be symptomatic of other problems:

- Hazardous work;
- Poor work environment;
- Unrealistic deadlines;
- Lack of job satisfaction;
- Lack of participation and control;
- Inadequate training and supervision;

- Work culture; and
- Shift work.

Indeed the fatigue generated by these factors combined with increased deregulation of the labour market in Australia raises major issues regarding OH&S in the workplace (ACIRRT, 1999). As Nolan (2000) argues:

Employees and unions have questioned why random drug testing has assumed such priority in an industrial climate where increasing demands have been placed upon worker to work twelve hour shifts. Evidence suggests that it is fatigue and not impairment through drugs and alcohol abuse which leads to the majority of accidents (p.2).

If management is truly interested in these issues, argues the ACTU, then a more holistic approach should be adopted, for example to include fatigue monitoring and management systems. This raises a second often more subtle and complex issue – that of control in the workplace. Trade unions often see the introduction of concepts such as drug-testing as management exercising control under the guise of ‘its right to manage’, and a strategy to marginalise the counter-veiling power of unions, limiting their effectiveness whilst significantly increasing managerial control, particularly where there is no consultation on the subject. This can potentially become a major issue of conflict between management and the trade unions. As Webb and Festa (1994) note:

On a broader scale, the notion of testing programs, especially if introduced unilaterally and without reference to or consultation with employees and their representative bodies, is philosophically at variance with labour relations in Australia (p.101).

The following case study illustrates the contentious issue of drug-testing in the workplace through a major dispute which flared in August 2000 at the South Blackwater Mine in Queensland over this specific issue.

Case Study – The South Blackwater Mine

Background

South Blackwater Coal Ltd (SBCL) employs 400 workers and is located approximately 900km north-west of Brisbane at the heart of the Bowen Basin coal mining region of Queensland. As part of policy development to ensure a safer working environment, management and trade unions were in the process of negotiating policies and procedures for drug-testing at the mine (in line with that of other mines in the region). Previously, testing only took place if staff were involved in an accident. During this process, management found a used syringe on-site and took this as prima facie evidence of illicit drug use in the workplace. Management immediately moved to install drug-testing procedures at the mine. Trade unions advised their members to refuse this blanket testing for drugs, at which point they were stood-down by the company. After one week and three visits to the Australian Industrial Commission (AIRC) the case was (theoretically) resolved. The following analysis illustrates the problems and issues associated with the implementation of these procedures.

Issues Preceding the Dispute

SBCL management had been in negotiation with the Construction, Forestry, Mining and Energy Union (CFMEU) and the Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union (CEPU) for approximately 10 months, in an attempt to implement a company “Drugs and Alcohol” policy at the South Blackwater Coal Mine. From management’s perspective, the rationale for the introduction of such a drug policy was to:

- *Identify any drug problems that might exist in the workforce and incorporate the results into the education part of the process;*

- *Ensure that the drug testing scheme operates effectively, and consider any changes that may be required in future anti-drug efforts; and*
- *Ensure that the company provides a 'safe workplace' (for both employees and visitors) and that 'safe systems of work' are not jeopardised by individuals under the deleterious influence of illicit substances (AIRC, 2000:1).*

In August, 2000 a needle stick injury was reported which was caused by a used syringe located in a toilet on-site. The General Manager Jim Randall, noted that:

After we had our experts look at it, it was obvious it had been used for some kind of drug injection on-site.

Management took this as prima facie evidence of drug abuse in the workplace. Due to its responsibility to maintain a safe work environment, and its frustration with regard to the negotiation process to date, SBCL management informed the unions in July 2000 that it was going ahead with the implementation of its Drugs and Alcohol policy in August of that year. The first stage was the introduction of 'blind' drug tests for all employees (as a precursor to random drug testing). The 'blind' tests required each employee, contractor and even visitors to the site to provide a urine sample for testing, but no specific records (identifying individuals) were to be kept. Management justified this decision to the unions by citing a requirement under law to provide both a safe workplace and safe systems of work, as allowed for in the certified agreement, which stated:

This clause does not remove the right of SBCL to unilaterally develop and implement safety policies or procedures, subject to any dispute being dealt with in accordance with clause 2:15 (SBCL, 1998).

The mine's management stated that the introduction of such a testing program was consistent with industry standards, and SBCL's competitors had undertaken similar substance tests for some time (Randall, 2000). Management argued that the 'blind' testing was merely a way to provide the company with useful statistical data, upon which management could act should the need arise (Randall, 2000).

Senior SBCL management indicated that the company believed it had the right, if not the obligation, to test for illicit drugs and alcohol abuse, citing the concern for employee safety and the vicarious liability of the company for employee actions. Management attempted to alleviate employee/union concern by stressing that the policy was the result of a safety issue, and not one specifically designed to reduce workforce numbers. As the general manager Jim Randall stated:

*...we are very concerned about drugs in the workplace and safety issues....
Management wanted to alleviate any employee fears about drug testing and stressed the policy was a safety issue (cited in Vale, 2000).*

Dispute over the introduction of Drug and Alcohol Policy

Negotiations continued through the period leading up to the implementation of the blind test, however, no agreement was reached as the union refused to condone the company policy as it was presented. SBCL management enforced the implementation of the 'blind' testing regime, employing evidence of the used syringe found on-site as prima facie evidence of illicit drug use. As Jim Randall reiterated in the week the drug testing policy was implemented:

We've asked all the workers, not only all the workers but all the visitors, all the contractors, anybody on this site, we've asked them to participate in what we're referring to as a blind test, and a blind drug test is where we're simply testing anybody on site here as a precursor to random testing. But the blind test will not take anyone's name, it's simply for information so that we can gather information about the incidence of drug-taking on our site

The CFMEU and CEPU advised their members to refuse to undertake the tests. Although the action of refusing to undertake a 'blind' test for illicit substance abuse was not considered to constitute

'industrial action' by the Australian Industrial Relations Commission (AIRC), SBCL management stood down all of the employees that refused to provide the required urine sample (250 in total) without pay, resulting in the initiation of industrial conflict.

CFMEU and CEPU representatives cited two important issues behind their decision not to 'allow' their members to provide the samples required by management. Firstly, the union rejected managerial arguments concerning the need for a 'safer workplace'. The unions argued that the employer's concern was not so much safety, but rather an attempt to increase the ability to rid themselves of 'trouble employees' (Vickers, 2000 cited in Vale, 2000). Union representatives were concerned that management seemed interested only in the issue of whether employees were using illicit substances, not why they were using them. Indeed, as the state secretary of the CFMEU, Andrew Vickers, stated:

.. the miners were not against drug-testing but did not want a half-baked scheme put up as part of a feel good exercise by management. Peeing in a cup and submitting that for drug testing will not tell you if you're stressed or fatigued. We want proper procedures and protocols used and genuine safety measures, not just more arrows in the company's quiver of punitive measures. (cited in Olsson & Vale, 2000: 6).

The second issue identified was that of the inability of substance testing to accurately gauge the level of employee impairment whilst on-duty. It was the contention of the unions that substance testing may be inherently flawed in efforts to ensure a safer workplace for all individuals. In addition, union representatives also noted that if the issue is OH&S, then measures of impairment and chemical ingestion related to the work itself should also be included in these safety procedures. As Steve Pierce of the CFMEU stated:

.... The union wanted pupil dilation tests and psych-motor test (which measure average reaction times), and protocols including anonymity, protection from legal action and proven validity attached to urine testing. It also wanted increasing use of 12-hour shifts examined in tandem with fatigue and stress tests. Finding out down the line that you've dangerous practices is too late. ... I believe tests for impairment are probably more accurate than just a test for presence of substance... We're not condoning the use of illegal substances, but a person could be measured to have it in his system when in fact there is no impairment.

Representatives of the CFMEU maintained this argument that whilst agreeing that a drugs testing procedures were consistent with the company's "fitness for duty" policy, it needed to form part of a 'proper set of comprehensive procedures' aimed at the detection of fatigue and stress levels as well as illicit substance abuse and subsequent employee rehabilitation. The CFMEU counter position regarding the implementation of the testing policy focused on four points:

The union will refuse to allow members to submit for drugs testing if the employees are collectively unhappy with the intrusion into their personal lives;

- The testing of urine samples does not reveal the extent of impairment, with some drugs staying in the human body long after any significant effects have 'worn off';
- The drugs testing policy discounts any analysis of why the employee is taking illicit substances, focusing only on the question as to whether they are taking drugs. Such a lack of analysis fails to indicate whether working conditions may be partly responsible for employee dependence upon illicit substances (eg. 12-hour shifts, work stress levels, poor job satisfaction; unrealistic deadlines etc);
- The drugs testing policy fails to test for chemicals that may enter the bloodstream of an employee via their work duties that may be harmful and adversely affect their performance (eg. carbon dioxide levels; excessive dust particles etc.)

Sources: Olsson & Valle, 2000; Vale, 2000; AIRC, 2000.

Resolution of the Dispute

At this point in time there is a major stand off between management and trade unions on this issue of drug-testing the workplace at the South Blackwater mine. Using your understanding of the issues associated with this contentious issue and your negotiation and advocacy skill answer the following questions.

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